

Testimony of

Mr. Donald Griffin

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TESTIMONY OF
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COMMITTEE ON THE JUDICIARY
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My name is Don Griffin and I am the Director of Strategic Coordination & Research for the Brotherhood of Maintenance of Way Employees, a Division of the International Brotherhood of Teamsters. Maintenance of way employees build and repair the railroad tracks, bridges and structures on the nation's railroads. I am here representing all of the Railroad Labor Union members of the AFL-CIO as the Chair of the Rail Labor Division's Asbestos Subcommittee.

Senator Specter, Senator Leahy, Rail Labor is pleased to be able to share our views with you. Sadly, in the rail industry, as in many other industries, workers have been exposed to asbestos as part of their job. They have and will continue to pay with their physical well-being, and some with their lives, for simply doing their jobs.

The plight of these hard-working citizens sometimes becomes lost in a welter of competing facts and figures. It is a tragedy that working men and women are becoming sick and are dying from exposure to asbestos. It would be an unbearable tragedy if we added to that burden by forcing them to die in poverty.

To know someone suffering from deadly asbestos disease, as I do, and most people who work on the railroad do, is to know that, first and foremost, any legislation in this area must treat the sick and injured fairly. The proposed bill does not treat railroad workers fairly because it takes away a railroad worker's federal statutory right. Under this bill a railroad worker may not bring a claim under the Federal Employers' Liability Act, otherwise called "FELA," for an asbestos-related injury or illness on the job. All other workers retain full rights to bring claims for asbestos-related injuries or illnesses under state or federal laws with regard to their specific employers.

Let me start with a simple fact, recognized by such diverse bodies as the Supreme Court and the Government Accountability Office: FELA is the law that provides compensation to railroad workers who become sick or injured in the course of their railroad employment. This has been the law since 1908. In other words, FELA, is the railroad worker's version of a workers' compensation law. A railroad worker injured on the job uses FELA exclusively to obtain compensation for his or her injuries, because a railroad worker is not eligible for state workers' compensation. This compensation includes sufficient funds to pay for the cost of medical treatment of the asbestos injury or illness.

Whether one thinks FELA is a good way to provide workers compensation benefits, or a bad way, it is the only way railroad workers receive compensation for job-related injuries and illnesses.

Injured rail workers may have access to other benefits designed to assist sick or injured workers, similar to the benefits of workers in the rest of the economy. These are modest benefits designed to provide a safety net for railroad workers who are unable to work for any reason, not just job-related injuries or diseases. For example, the Railroad Retirement Board provides sickness benefits for up to 6 months that provide about 35% of the average daily earnings of maintenance of way worker. A Railroad Retirement Total Disability annuity is the equivalent of one

provided under Social Security. Additionally, employees with more than 20 years' of railroad service may be eligible for an Occupational Disability annuity if physically unable to work their jobs and if they meet other eligibility criteria. All are federal statutory programs, in place for decades, none of them ever intended by Congress to replace FELA.

Rail Labor's Proposal

We do not believe that asbestos claims under FELA contribute to the alleged asbestos litigation "crisis." The number of FELA asbestos claims is small, the total number is only a few thousand, and the incidence of new claims is trending down. The majority of FELA asbestos claims came from those workers who had performed work on steam locomotives. However, as you all know, steam locomotives disappeared from the nation's railroads by about 1960 so the group of potential claimants is quickly disappearing. Simply put, asbestos claims under FELA are not clogging the courts, indeed most cases settle out of court. Additionally, the claims under FELA for asbestos-related injuries and illnesses do not threaten the economic health of the railroad industry. For example, late last year the Union Pacific took an after-tax non-cash charge of 58 cents per share in the fourth quarter to cover the future estimated costs of presently unasserted asbestos claims. According to the railroad, this charge would not affect current or future cash flows and, significantly, the railroad projected that "on going asbestos-related expenses are expected to decrease beginning in 2005." Union Pacific Corp. Form 8-K, filed 12/21/04. There is no litigation crisis regarding FELA and asbestos.

The vast, vast majority of all asbestos claims are settled without any lawsuit whatsoever. The railroads never have claimed to Rail Labor that FELA asbestos claims are creating an economic hardship for the industry. Frankly, Rail Labor strongly believes that there is no legitimate public policy rationale for taking away railroad workers' rights under FELA for asbestos-related injuries and diseases. While FELA is a tort claim, the only person who may bring such a claim is someone who worked on the railroad and can prove his or her injury occurred as a result of the railroad's negligence. Third parties cannot bring FELA claims against a railroad.

Nonetheless, at the strong urging of Senator Specter that we devise a plan that removes asbestos FELA claims from any potential impact on the tort system, Rail Labor has made a proposal that accomplishes the charge given us by the Chairman. We have made a proposal to Senator Specter, Senator Leahy and other Senators that puts railroad workers' compensation claims for asbestos under FELA into an administrative system that does not involve the courts. Our proposal is attached to my testimony as Appendix "A."

Our proposal is simple - Rail Labor and Rail Management will sit down and agree upon a matrix of benefits and eligibility standards for asbestos injuries that would otherwise be covered by FELA, and administration of those standards and benefits are handled the same as others created under the proposed bill. If labor and management cannot agree promptly on the values for the matrix or the eligibility standards, a neutral third party will do so. The simple standard is to make the benefit equal to the amount that the injured rail worker would have received under FELA.

Rail Managements' Proposal

Our proposal stands in stark contrast to the proposal of rail management which would provide railroad workers injured or sickened by asbestos with almost nothing to replace their pre-empted FELA claims.

The proposal of rail management is to deny rail workers entirely the benefits they get under FELA, to eliminate completely workers' compensation for rail workers with asbestos disease. I can only describe as shocking the notion that the workers compensation rights of rail workers should be eliminated by this bill. Shockingly, rail management appears quite satisfied that rail workers are the only workers in America who will have their workers compensation rights eliminated by this bill. That was the case in the legislation in the last Congress and is the effective result of the provision the rail industry is currently proposing.

Rail management has argued that it is okay to strip rail workers injured by asbestos of their workers compensation benefits simply because FELA claims can be presented in court and one of the purposes this bill is to take asbestos cases out of the courts. Rail management then argues that because rail workers get other statutory benefits, asbestos injured rail workers don't need their workers compensation also.

The rail industry proposal contained in the proposed Section 131(b)(4) pretends to replace FELA with an allowance in place of FELA. It is a fig leaf. It is hard to imagine a rail worker who would get a single penny in compensation under the Rail management proposal in return for losing his or her workers compensation.

Under Rail management's proposal, a rail worker must survive a procedural maze of requirements, and then be eligible for railroad occupational disability, which eliminates the vast majority of rail workers. If a rail worker can show that he or she is entitled to occupational disability, the rail industry proposes that the rail worker receive the difference between what the worker would receive under some undefined state workers' compensation program and what the individual would receive under a Railroad Retirement Occupational Disability annuity. However, there is no comparable proposal in any asbestos legislation that I have seen for workers in the rest of the economy to qualify for a Social Security Disability before they can apply for workers' comp.

Let me provide you a few highlights of the results of the rail management proposal -

? You have to have worked for the railroad for 20 years to be eligible to apply for an Occupational Disability. If you have less than 20 years of service, Rail Management's proposal provides nothing. Railroad Retirement Board figures for the year 2002 show that over 90,000 rail workers, about one third of the workforce, have less than 10 years of service in the industry. This group, plus those with between 10 and 20 years of service, get nothing under the proposal.

? You have to be working for the railroad industry at the time of your disability in order to be eligible for Occupational Disability; if you have asbestos disease caused by exposure while you worked for the railroad, but you no longer work for the railroad, because you have changed jobs or retired, you get nothing.

? An Occupational Disability provides an annuity only; there is no coverage for medical costs related to the reason for the disability. Needless to say, the medical costs of a worker with asbestos disease are substantial. Occupational Disability annuity payments averaged \$1800 in Fiscal Year 2002 according to the Railroad Retirement Board. Needless to say, that amount is insufficient to cover the cost of medical treatment for the disability and the needs of worker for shelter and food, both for the worker and his/her family. Rail Management's proposal provides rail workers with neither medical insurance for their injuries or illnesses nor cash compensation to purchase that medical care.

? Occupational disability is a benefit under the Railroad Retirement System that is comparable to Social Security disability. Rail workers injured by asbestos exposure may receive an Occupational Disability today if they meet all the eligibility standards, in addition to any FELA settlement or award. To claim that this modest and limited disability program is a complete replacement for losing workers' compensation under FELA, when the injured worker gets it today, along with FELA, is simply a device to deny injured rail workers their workers compensation. I must add that I participated in the negotiations leading to a change in the Occupational Disability standards in 1997 and Rail Management never suggested then that the Occupational Disability annuity should constitute the full compensation accruing to a rail worker suffering an asbestos related injury or illness.

? Many rail employees are retired when the long latency asbestos diseases strike. By definition a retired rail worker is not eligible for Occupational Disability, and he or she gets nothing. In contrast, a retired railroad worker may make a claim under FELA for an asbestos-related injury or illness provided he or she meets the applicable statute of limitations for such a claim, just like a retired worker subject to other workers' compensation laws.

While it may be possible that a hypothetical rail worker might qualify for an "adjustment" under Rail management's proposal, it is undisputed that a substantial number of injured rail workers will be denied entry into the "adjustment" maze. That result is patently unfair to injured rail workers.

Even if a rail worker qualified for an "adjustment," what would the workers' compensation measurement be? By definition, all rail workers are ineligible for state workers' compensation benefits, so there are no state, or federal, tables to determine the benefits for injured rail workers. Additionally, many rail workers: maintenance of way workers, locomotive engineers and conductors come readily to mind, work in a number of states in each year and asbestos exposure could well have occurred in one or all of those states. Again, which state workers' compensation law would apply? Rail managements' proposal is a procedural nightmare.

Let me make clear the effect of the Rail management proposal - rail workers will be the only workers in the country who are denied their workers' compensation benefits and they will get nothing to replace them.

They can go to the Trust Fund and get the statutory benefits, but unlike every other worker in America who is eligible for workers compensation, they will be denied their workers compensation.

Data

We have proposed an administrative system that simply and efficiently provides rail workers the same level of benefits they would have gotten under FELA. I would like to give you precise data on the amount and severity of asbestos disease among those who worked on the railroad, and tell you precisely what it will cost, how many people would get the benefit, and what the benefit level would be. Unfortunately I can't.

For over a year, we have repeatedly asked rail management to share with us the information they collect about asbestos cases under FELA, and we have been repeatedly denied any information. We have offered confidentiality; we have offered to have Judge Becker hold the information; we have suggested that the data be aggregated to ensure that it not be used against rail management in cases. Regardless of how we have asked and what conditions we have been willing to accept, the Railroads' answer remains a constant "no."

Unfortunately, rail management has all the data. We have anecdotal information, but anecdotal information is vastly inferior to the data the railroads keep about asbestos and all other claims. .

FELA Pre-emption and Collective Bargaining

As I stated earlier, FELA asbestos cases are not part of any asbestos litigation problem. And to throw out FELA for asbestos injuries, a system that works for rail employees, leads us to believe that there is another motive on the part of rail management. This is reinforced by statements from representatives of rail management that they will not save any money under asbestos legislation - their contributions to the Trust Fund will equal or exceed what they expect to pay out for asbestos claims in the future.

Let me suggest what that motive might be. The rail industry has apparently decided that they don't like FELA, a law that has been around since 1908. As part of their collective bargaining demand in the current round of negotiations, they have suggested that if there is not an agreement to change FELA, they will unilaterally seek its repeal by the Congress. We believe this a tactic in that effort, a means to influence collective bargaining. We were pleased to hear Senator Specter say that any effort to eliminate FELA will not have his support, and that he believes that such an effort is ill advised, but the fact remains that the Railroads have made public their opposition to FELA generally.

Mixed Dust

Track workers are exposed to substantial amounts of silica dust while working in and around the stone ballast that supports the track structure. Between 1993 and 1997, NIOSH collected personal samples from 185 track workers employed by CSXT; 15 per cent of those workers' samples exceeded the NIOSH Recommended Exposure Limit (REL) for respirable quartz. Similarly, the Virginia Department of Health requested NIOSH to test Norfolk Southern track workers in Virginia for silica dust exposure following a private physician's report to them that his patient, a 20 year track worker, suffered from severe pneumoconiosis, presumably from silica dust exposure. NIOSH studies in 1991 revealed that 54% of the personal samples exceeded the NIOSH REL for respirable quartz. The NIOSH report on Norfolk Southern concluded that track workers were being overexposed to crystalline silica in the performance of their track maintenance jobs.

These studies highlight how significant the "mixed dust" issue is to railroad workers, particularly maintenance of way workers. Rail Labor fully supports and endorses the comments made by the AFL-CIO's witness on this important issue.

Conclusion

The present bill takes away railroad employees' workers' compensation rights under FELA and places them in a worse position compared to any other workers in the United States who have a claim based upon an asbestos-related injury or illness. Apparently Rail Management believes that its employees should be treated as second class citizens regarding compensation for these injuries or illnesses.

Rail Labor's proposal reluctantly accedes to the removal of railroad employees' right to federal statutory protection and tries to level the playing field for rail workers by restoring to them similar compensation benefits preserved for other workers in this legislation. Moreover, Rail Labor's proposal is consistent with a tradition that extends back to 1926 when the Railway Labor Act was first enacted; that is, legislation affecting railroads and their employees is best accomplished through negotiations between management and labor, and reviewed, amended and adopted by the Congress. Rail Labor's proposal puts the responsibility squarely on labor and management to agree upon a fair replacement for the railroad workers' lost FELA rights and only, as a last resort, puts resolution of that dispute in the hands of a third party for a final and binding resolution.

Mr. Chairman, Senator Leahy and other Committee members, I respectfully request that you include Rail Labor's proposal in this proposed bill. Thank you.